

July 1. 1767.

A N S W E R S

F O R

JOHN LAYCOCK of *Bradford* in the County of *York*,
Leather Pencase-maker, and WILLIAM WILSON
Writer to the Signet, his Attorney ;

T O

The PETITION of *Thomas Clark* Leather Case-
maker in *Bristo*, near *Edinburgh*.

THOUGH the laws and constitution of Eng-
land are extremely averse to monopolies in fo-
reign trade, because these stop the general cur-
rent of it, yet they are favourable to the
granting exclusive privileges to the inventors of particu-
lar branches of art within the kingdom ; because thereby
domestic invention, ingenuity, and enterprize are encoura-
ged. Hence to the inventors of all new arts, or even pieces
of mechanifm, the King is, by the constitution, under-
stood to have a power of granting an exclusive privilege
for a certain number of years. But then, as even such do-
mestic exclusive privileges partake, in some degree, of the
bad effects of exclusive privileges as to foreign trade ; so
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common prudence and common policy point out, that the law, when it grants these exclusive privileges to new inventions, must be much on its guard, that those who get such domestic privileges should be justly intitled to them; and particularly, should be the real inventors of those arts which they pretend to have invented. It often happens, that the real inventors of such arts are themselves the most modest, and that people who come after them, and who observe the value of that art, which even the man who invented it did not make a boast of, claim the merit of the invention; and hence it often happens that, in England, people claim and get patents for inventions which others are the fathers of: But then, as soon as it appears that this is an imposition, and that the pretended invention was known to, and practised by other people, then the patent is disregarded, and courts of justice look upon it with an aversion proportioned to the favour which it formerly obtained.

Thomas Clark the petitioner, a shoemaker in Edinburgh, went, some years ago, a travelling into England: Being an ingenious man, he observed every thing that was curious in that country relating to his own art, and brought back to his own country the produce of his observations and inquiries. It would have been very well if he had stopped here; but his ambition went too far: Instead of being satisfied with the honour of bringing the inventions of another country home with him, he pretended these inventions were his own. And particularly, having observed a method known to a few leather-mechanics in England, of making leather snuff-boxes, and pen-cases, in a form which, by his means, is now very well known in this country, he pretended he was the author of this invention; and not only so, but applied to his late Majesty for a patent to have the exclusive privilege of making them.

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It is well known, that patents of this kind are very easily obtained : They are little else than the mere forms of office. Neither does any mischief accrue from their being so easily obtained ; for if the person who obtains the patent is the real inventor, he deserves all the encouragement the patent can give him ; and if he is not the real inventor, then other people have it always in their power to avoid the limitations of the patent, by showing that he was not the inventor. Hence the petitioner easily obtained his patent, upon paying the fees of office ; but did not attend that it was given *periculo petentis*, as every such patent, in the nature of things, must be ; seeing it is impossible to suppose the officers of the Crown to be mechanics themselves, and much less to be acquainted with the history of mechanics in past ages, and in all the different parts of Britain.

It happened that the respondent had been in the use, for many years, of making those snuff-boxes and pen-cases in England which the petitioner pretended he had invented in Scotland. But the petitioner, thinking that his patent was to him like an act of parliament excluding all mankind from dealing in his trade, brought an action of damages, or, as it is called in England, an action upon the case, against the respondent, before the Court of King's Bench, complaining, that the respondent, having infringed his patent, had made many thousand leather snuff-boxes and pen-cases ; and therefore concluding for 500 Sterling of damages.

This question being merely a matter of fact, to wit, Whether the respondent had been in use to make work of the same kind with the petitioner's, before the petitioner had obtained his patent, was, like all other questions of fact, remitted to a jury by Lord Mansfield ; which jury, upon a proof led before them, found no ground for the action ; upon which the court dismissed it : And thereafter the court found costs due. And the extent of these costs
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having been remitted to be ascertained by the proper officer of court, they were fixed at *L.* 70 Sterling. A very moderate sum, when it is attended to what the expences of a trial by jury in the Court of King's Bench is.

The petitioner confesses, pages 7. and 8. that the question in issue was, Whether the patent was vacated on account that the petitioner was not the inventor of the art? though he says, without any evidence, that there was only one witness who deponed, that the art had before been invented.

The words of the judgment are in the following words:

Apr. 26. 1766. " Afterwards, that is to say, on the day and at the place
 " within mentioned, before the Right Honourable William
 " Lord Mansfield, the Chief Justice within written, having
 " associated to him John Way gentleman, by force of the
 " statute in that case made and provided, as well the
 " within-named Thomas Clark, as the within-named
 " John Laycock, do come by their attornies within named;
 " and the jurors of the jury, whereof mention is in
 " within made, being summoned come, who, to say the
 " truth of the within contents, being ballotted, tried,
 " and sworn, according to the form of the statute; and
 " say, upon their oath, That the said John Laycock is in
 " noways guilty of the premises within laid to his charge,
 " as the said Thomas Clark hath within thereof complained
 " against him: Therefore it is considered, that the
 " said Thomas take nothing by his said bill, but that he
 " be in mercy, and for his also claim; and that the said
 " John go thereof without day. And it is further
 " considered, that the said John recover against the said
 " Thomas seventy pounds for his costs and charges laid
 " out by him about his defence on this behalf, adjudged
 " to the said John by the Court of Our said Lord the King,
 " now here by his own assent, according to the form of
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“ the statute in the like case made and provided; and that
 “ the said John have execution thereof,” &c.

The usual way in England is, that upon a decree giving costs, the one attorney pays to the other the costs taxed; but as the petitioner was a native of Scotland, residing there, and so could not be attacked in England, he gave directions for staving off the payment of the costs from time to time, and thereby created fundry expences of court, which amounted to *L. 6 : 18 : 3* over the *L. 70*, and then refused payment altogether.

The respondent, in this situation, was obliged to bring a process in this Court against the petitioner, for payment of the above *L. 70* of original costs, and *L. 6 : 18 : 3* of subsequent costs.

The cause came before Lord Kennet, on the 25th of July last; when the respondent produced the decree of the Court of King's Bench upon stamp paper, and duly authenticated by the signature and oath of the proper officer. But the defender made this extraordinary defence, in the following words: “ That no action lies against him for
 “ the costs libelled; that there is no evidence that costs
 “ were awarded either by Lord Mansfield or by the ver-
 “ dict of the jury, nor had the master of the Court of
 “ King's Bench any power to tax any sum of expences
 “ whatever; and contends, that the copy of the proceed-
 “ ings produced is not authentic.”

In order to check this cavilling humour, the Lord Ordinary, of that date, pronounced the following interlocutor:

“ Ordains the defender, by a writing under his hand, to
 “ confess or deny, whether or not it consists with his
 “ knowledge, that the judgment given in the Court of
 “ King's Bench was conform to the attested copy produ-
 “ ced; and to produce in the clerk's hands any letters of
 B “ correspondence

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 1766.

“ correspondence received by him from his attorney or
 “ solicitor, in relation to the said judgment, and that
 “ betwixt and next calling ; with certification.”

The defender, seeing that this interlocutor run him to a point, and that his subterfuges could no longer avail him, gave up his objections to the veracity of the decret, and took up different ground. His words are in the minute of 29th of July last: “ Rae, for the defender acknowledges, “ that the accompt pursued for was taxed to L. 70 Sterling ; “ but the defender’s plea is, That no action lies, either in “ law or equity, for payment thereof *extra territorium*.”

His Lordship, on this confession, ordered the parties to give in mutual memorials. And his Lordship, on considering them, pronounced the following interlocutor: “ The Lord Ordinary having considered this memorial for “ the pursuers, with the counter-memorial for the defend- “ er, repels the defences pleaded for the defender, and “ decerns against him for the sum of L. 70 Sterling of “ expences awarded by the decree of the Court of King’s “ Bench.”

The petitioner represented; and, on representation and answers, the Lord Ordinary adhered, on the 5th February last.

The petitioner gave in a second representation, which was refused without answers, on the 20th February last; and a third which was likewise refused without answers: And now he has preferred a petition, which your Lordships having ordered to be answered, the following answers are submitted.

The question upon which this cause seems to depend is whether, after a case has been fairly and deliberately tried and decided in the court of one country, the party who has been found to have been in the wrong, and who sub-tracts himself from the jurisdiction of that country in which

which he brought his cause, may, when he is pursued before the Court of the country into which he retires, upon the decree which himself was the cause of pronouncing, is to be allowed to have the cause tried anew from beginning to end? Or, whether it is to be presumed that the former decision was just, unless it be clearly proved to have proceeded upon some palpable injustice?

The principles on which the interlocutor seems to stand firm, are these; *first*, That the decision of the supreme court of one country is intitled to credit and authority with the supreme court of another country, unless some palpable injustice be proved against it. *2dly*, That this much more takes place, when the party, against whom judgment has been obtained in a foreign country, was himself provoker of the action in that country. And *lastly*, That the petitioner had relief in England, and ought there to have sought it, if he meant to complain of the decree as unjust.

1st, It is as evident a principle as any in government and expediency, that property should be ascertained with as little delay, and at as little expence as possible. It is known from experience, that, except where the narrowness of a country makes it in some degree tolerable, there is no circumstance in legal procedure more ruinous and oppressive, than the dragging a person through different courts before he can obtain his right, and obliging him to bear repeatedly all the expence, delay, and anxiety of different lawsuits, for the same subject. If this is hard, even where the courts are in one country, how much harder would it be, if he was obliged to pass through the courts of different countries, for the same subject of litigation?

In order to avoid this embarrassment and hardship, there is introduced, among all civilised nations, a certain

comitas.

comitas and respect, in the courts of every nation, to the judgments of the courts of another nation. This goes just the length it ought to go, and no further: For though the court of one country presumes the judgment of the court of another country, to be just; yet, if a palpable injustice is proved in it, this *comitas* is made to cease.

The petitioner takes an unfair advantage of the respondent's plea, when he represents it as a demand to your Lordships to carry into execution a foreign decree; and maintains, that you are not blindfold to be the executors of other judges decrees. This is not what the respondent asks: He only uses the decree as a ground of action; and he contends, that this ground of action is to be presumed to be just, until his party proves it is unjust.

Now, if this *comitas* takes place among the Courts of nations living under different sovereigns, having different interests, and often hostile to each other, how much more ought it to take place betwixt the courts of two countries living under one sovereign, united in interest, and knit like sisters in amity? In such a case Voet says, No. 41. ad tit. *De re judicata*, That the mutual assistance of Courts to one another, is not only *comitatis*, but *necessitatis*; And, in Holland, it is particularly enjoined by the order of the States, by the 17th article of the *Ordonantiæ opte justitiæ de Sleden*.

Authorities are numberless, in confirmation of these principles. Voet lays down the rule even broader than the respondent has here done, tit. *De re judicata*, No. 41. He observes, that the judge of one territory ought to interpose his authority for carrying into execution the sentence pronounced by the judge of another territory, without entering into a thorough discussion of the merits of the judgment. His words are: "*Nec eam ad examen penitus revocet, sed pro justitia ejus a equitate presumat.*" From
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this rule he only mentions two exceptions, to wit, “ Si
 “ animadvertet judex requisitus sententiam latam esse di-
 “ recta contra sui territorii statuta, circa res immobiles
 “ in suo territorio sitas, eadem non exsequitur, uti nec si
 “ alias absque proluxa causæ cognitione, constet sententiam
 “ nullam esse.”

In the same way Faber, in his *Rationalia ad leg. 75. De jud.*
 says, “ Quod tamen si dicas ipsas jurisdictiones, licet sub
 “ diversis principibus constitutas, sibi invicem subsidiarias
 “ esse, mutuisque auxiliis juvare se debere, non repugna-
 “ bo nec improbabo usum litterarum quas rogatorias aut
 “ requisitorias vocant, quibus in hanc rem passim utimur.
 “ Sed dicam *inconveniens et absurdum fore, si judex requisitus*
 “ *debet cognoscere de nullitate sententiæ judicis requirentis;*
 “ *quia id non adjuvare esset, sed turbare jurisdictionem quam*
 “ *adjuvare deberet.*” And a little after, “ Non alius de
 “ nullitate sententiæ cognoscere potest, quam qui posset
 “ cognoscere de iniquitate per appellationem, cum sit u-
 “ trumque ejusdem potestatis. Proinde mea sententia est,
 “ judicem requisitum debere hoc tantum inquirere, *An*
 “ *condemnatus fuerit; de quo uno ubi constiterit, nihil præterea*
 “ *inquirendum.*” To the same purpose Mynsiger, *Observat.*
Cent. obs. 69. “ Judex requisitus, per exequanda sententia,
 “ non potest *de causa jam cognita cognoscere.*” And Gail,
Obs. lib. 2do. obs. 130. No. 12. & 13.; and lib. 1mo, obs.
113. No. 8vo,

Huber lays down the same position in a digression, *De*
conflictu legum in diversis imperiis, subjoined to the title *De*
legibus, in these words: “ Rectores imperiorum id comiter
 “ agunt, ut jura cujusque populi intra terminas ejus exer-
 “ cita teneant ubique suam vim, quatenus nihil potestate
 “ aut juri alterius imperantis ejusque civium prejudicetur.”
 And he subjoins, “ Ex quo liquet, hanc rem non ex sim-
 “ plici jure civili, sed ex commodis, et tacito populorum
 “ consensu, esse petendam: quia sicut leges alterius po-

“puli apud alium directe valere non possunt, ita commerciiis, et usu gentium promiscuo, nihil foret majus incommodum, quam si res, jure certi loci validæ, mox a libi diversitate juris infirmarentur; quod nullum videtur habere dubium.” And he adds, *par. 6.* “Similem usum habet hæc observatio in rebus judicatis.” And gives several instances apposite to the case in hand.

Justice, on the laws of the sea, p. 427. mentions a case, where it was agreed, that the judge-admiral of England must sustain a decree of a foreign court of Admiralty. Another is mentioned in Rolles's Abridgment, tit. *Courts*, sect. *Admiralty*. And Molloy, *De jure maritimo et navali*, b. 3. cap. 8. par. 8. treating of the laws of nature and nations, takes notice of a case, where execution was awarded by the judge of Admiralty in England upon a sentence of the governor of Friezland: And he says, when the defender, upon being taken, brought his *habeas corpus*, the sentence was adjudged well execute by the laws of nations, and according to the laws of the realm of England.

The respondent has been the more particular in stating these authorities from the English practice, because the petitioner pleads, that an English decree is intituled to no favour, in respect the English judges disregard the decisions of other nations; but if the respondent is rightly informed, our extracted decreets are received as probative before the Court of Chancery, which is a court of equity, and, in that view, stands upon the same footing with the Court of Session.

Our own lawyers likewise all subscribe to the truth of the doctrine laid down on this branch of the respondent's argument. The book called *the Principles of Equity*, the doctrines of which are as deep and sound as they are ingenious, says, That with regard to a foreign decree sustaining a claim, “common utility, as well as regard to a sister-court, have established a rule among all civilized nations,

“ nations, that a foreign decree shall be put in execution, unless some good exception be opposed to it in law and equity.” And as to a foreign decree dismissing a claim, he says, “ We not only presume it to be just, but will not admit any evidence of its being unjust.”

Agreeable to which, every decision upon this point, pronounced by your Lordships, has proceeded. Two decisions are marked in the Dictionary, *voce* Foreign. The one was that of Goddard *contra* Swinton, 3d December 1713, observed in Forbes’s manuscript; the other, Edwards *contra* Prescott, 29th December 1720, observed by Hume. The petitioner is in a mistake in derogating from the first of these decisions, by saying, that a suppletory proof was granted by the Court. The fact was, that the foreign decree was in favour of a company, and the proof that was granted was for instructing that the pursuer was a partner in that company. The respondent is advised, that in a decision, within these few weeks, your Lordships gave faith even to the sentence of a court-martial, in the case of M’Harg against Campbell of Killberry.

The respondent, in this branch of his argument, has confessed, that one pursuing on a foreign decree will not have the benefit of a *res judicata*, if a palpable injustice appears in the face of it. But then the question comes, *cui incumbet* to show, that it is agreeable or disagreeable to justice? The answer is obvious: The *probatio* plainly lies upon the objector to the decree. Your Lordships will presume it to be just, till it is proved to be palpably unjust. Now, what are the circumstances from which the petitioner infers the injustice of this decree? The petitioner complains, that he was the real inventor of the art practised by the respondent, and that judgment was pronounced against him upon the false evidence of one Macbeath. But these, as your Lordships see, are pure assertions; and assertions of this kind never will be wanting, when any person has interest to aver that he has suffered injustice by the

the decree of a court: Were any ear to be given to them, the judgments of any court must pass only for waste paper, and the doctrine which the respondent hopes he has established could have no effect. Your Lordships will not believe, upon Mr Clark's bare averment, that he was the inventor of an art, of which the Court of King's Bench has found he was not the inventor, or that that decision proceeded upon perjury and false evidence.

The next ground upon which the petitioner attacks the justice of the decree is, That costs were awarded against him, not upon the opinion of the court, but upon a statute in the 23d year of Henry the eight. This is a very extraordinary accusation of injustice: For as in the former complaint of injustice, your Lordships are desired to believe, on the petitioner's mere assertion, and without the least evidence in support of it, that the English jury returned an unjust and partial verdict in favour of their own countryman, upon the oath of a single and perjured witness; so, in this second complaint, your Lordships are desired, by the lump, to suppose the law of England to be unjust, because it makes costs of suit to be the consequence of a verdict returned against a suiter. The respondent cannot see, that because his cause was supported by a statute found to be expedient for almost two centuries, that therefore it should appear to be less just. The statute is not *juris positivi*, it is only declaratory of what was law before. The statute deserves, at least, the same presumption in its favour with the sentence of a court, to wit, that it should be supposed equitable, unless the contrary be proved. In the case, Edwards *contra* Prescott, 29th December 1720, where the Court sustained action upon a judgment of the Court of King's Bench, this argument was pleaded upon much stronger grounds by the defender; for, in that case, Mrs Prescott had been found liable in damages, upon an English statute, which, if not unjust, was, at least, extremely hard, to wit, that she should be obliged to pay the whole damage done by a fire, because it happened to break out

out in her house. And what made the case still stronger was, that before the action was brought before your Lordships, the statute upon which the judgment in the King's Bench had proceeded, had been repealed in England as inexpedient. If, in that case, your Lordships sustained action upon the English decree, there can be little doubt with regard to the present, where the statute, if there be any such, is clearly supported by the strongest equity.

In a late case which was in Court from Dalkeith, Johnston *contra* the sheriff of Edinburgh had refused expences; the party complained, and with much show of justice; but your Lordships affirmed the decree, and gave this reason for it, That in cases of expences, inferior courts, who saw the behaviour of parties before them, might very well be trusted with the affair of expences or no expences. Now, if this compliment was paid to a sheriff-court, it would be not a little extraordinary to refuse the same degree of confidence to the Court of King's Bench.

But supposing the fact to have been, of which it shall soon be shown there are no evidence, that costs in this case were given upon the statute alone, and not upon the opinion of the court, it would not benefit the petitioner. If the fact is, which the petitioner much doubts, that costs are the unavoidable consequence of a verdict in England; yet still when an Englishman brings an action on which a verdict is to be returned, knowing the consequence of that verdict, he agrees and submits to the consequence, and is not at liberty afterwards to complain of it: And, in the same manner, when a Scotchman resorts to the law of England, and brings an action which must be decided by a verdict, he agrees and submits to all the consequences of that verdict, and cannot be allowed afterwards to complain of them. If the law stood otherways the leiges of the two countries would stand

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on a very unequal footing. When an Englishman attacks an Englishman unjustly, he shall pay costs for certain; when a Scotchman attacks an Englishman unjustly, he may return home to his own country, and maintain a plea in a new court, that he is not liable for costs decreed against him in the English court.

So far the respondent has followed the petitioner's argument, on the supposition the fact was, that costs were given in this case upon the statute, and not from the opinion of the court. But, in the next place, the respondent does not see where your Lordships have evidence that the fact was so. The decree does not say so; and it is the record alone that your Lordships can believe. The words of the decree, which the petitioner founds on to support his assertion, are these concluding words of the decree, "*According to the form of the statute.*" The words of the decree have been quoted above verbatim. The decerniture is but short, and these concluding words, "according to the form of the statute," apply, in common grammar, to all the parts of the decerniture, and therefore to the decree of absolutor, as well as to the decree of costs.

Thus the petitioner, upon whom the labouring oar, the *onus probandi*, lies, has failed in showing the decree to be unjust, which, even upon his own argument, it is incumbent upon him to do. But the matter does not rest here; the decree was most just. A man who imposes upon the Crown, and cheats his fellow-subjects by obtaining an exclusive trade, under pretence of his inventing what before had been invented by others, and who harasses his fellow-subjects by law-suits in support of his patent thus unjustly obtained, deserves, according to all the rules of private justice and public utility, to have costs decerned against him. The petitioner confesses the point in issue betwixt the parties was, whether the respondent had made the pen-cases in question before the petitioner's patent, and he

he owns that evidence was brought of it; though, upon his own assertion, he says, there was only a single evidence brought of it. Now your Lordships know, that, in a trial at law in England of a civil question, the deposition is not set down upon record; and therefore if, after a trial at law in England, the one party was to be allowed to bring evidence in Scotland that satisfying proof was not brought in the English trial, and the other party put to proof that satisfying evidence was brought, a victory in a suit of England, betwixt Scotch people, would be no more than a shadow. There would be constant clashings betwixt the sentences of the courts of the two nations; and human invention could not fall upon a more effectual expedient to keep the two nations in a state of suspicion, and distrust with, and distance from each other.

II. The next solid ground, on which the Lord Ordinary's interlocutor may be supported, is, that the petitioner himself was the provoker in the English action; and therefore must submit to the award of an English court, though a foreign one, because he himself chose it. If the respondent had been the provoker in that foreign court, the petitioner might be heard to complain of the hardship; but when it was he who drew the petitioner there, he cannot.

This is not only founded in principles of equity so broad that, without the aid of argument, the mind at once assents to it; but it is likewise founded in the strict principles of law. A bond granted, or contract entered into, in England, France, or any other country, liable to no exception of the laws or forms of that country, is always sustained here, however defective it may be in those solemnities which are required by our customs. The reason is, that the party, by binding himself in the forms of the law of the country in which he resides, shows, that he means to wave all objections from the want of observance of the forms of the law

law of this country. Many other instances might be given to show the rule to be general, that whatever is contracted formally and legally in one country, if clear injustice does not appear, is the foundation of action in another. Now, no distinction can be made between contracts entered into, and decrees pronounced at the instance of the person who seeks the decree, though the decree should be pronounced against him. And, indeed, judicial proceedings and decrees are, in law, considered as contracts; seeing the consent of parties must be inferred, from their appearing in court, and joining issue in the cause. Litiscontestation is really a contract, by which parties agree, that, if facts shall be proved, the defender shall be decerned in terms of the libel; and, if it shall not be proved, that he shall be assilzied. If the consequences of a contract are thus inferred against both pursuer and defender from litiscontestation, much more must it be inferred against the pursuer, who chuses his forum, who provokes to judgment, who leads and is not led.

Upon these principles, your Lordships decided the remarkable case betwixt Captain Hamilton and the Dutch East-India company, on the 24th July 1731. It is thus collected in the Dictionary, title *Foreign*, page 323. "Captain Hamilton having arrested the effects of the Dutch East-India company, *jurisdictionis fundendæ gratia*, brought an action against the company for damages alledged sustained by him, through their violent seizure and confiscation of a ship and cargo belonging to him in the East-Indies. The defence was, that the ship and cargo in question were, in due course of law, condemned and confiscated in the council of justice of Malacca; which, upon Captain Hamilton's appeal, was confirmed by the the council of justice at Battavia; and therefore they are safe *exceptione rei judicatæ*: Which exception the Lords sustained."

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In confirmation of this doctrine, the respondent must mention another case, not so much for the sake of the decision itself, as for the sake of President Dalrymple's observation upon it. Both together are thus taken notice of in the aforesaid page : " A bond betwixt two Scotsmen at London being challenged by the granter before the Court of Chancery, and the creditor once appearing, but thereafter withdrawing, a sentence pronounced reducing the bond, this was not found such a *res judicata*, as to bar the creditor from pursuing for the debt in Scotland ; Fountainhall, 24th February 1698 ; Cochran of Ochiltree *contra* Earl of Buchan." President Dalrymple, who observes this decision, June 1698, make this remark, " That if the creditors had provoked to judgment before the Chancery, it is like the Lords would not have found the decree reviewable at his instance who had made election of the judicature." This shows the decision proceeded on a different face from what occurs in the present case.

It is said for the petitioner, " That, in these two cases, the foreign decrees were not founded upon in this Court as grounds of action, but as grounds of defence against a new action brought in the courts of this country ; and that therefore, in these, the *exceptio rei judicatæ* properly applied." It is answered, in the cases of Goddert and Swinton, Edwards and Prescott, where a foreign decree was sustained as the ground of action in this court ; and in the case of Wilson and Brunton, where the same thing was adjudged in the House of Lords, the decrees were founded upon as grounds of action, not as grounds of exception. The petitioner himself confesses, that if he was to attack the respondent in Scotland, the respondent would be safe, by the *exceptio rei judicatæ*, so that he acknowledges one part of the decree to be binding in Scotland ; but upon what principle he can distinguish be-

twixt one part of the decree and another, is not easy to conceive. Had two separate and unconnected things been found in the decree, he might without indecency have attacked one part of the decree, while he owned, he was bound by the other ; but costs of suit are so strictly connected with the justice applied, that the one was a natural consequence of the other, and is almost the same thing with it ; so that the petitioner must either yield that both parts of the decree are binding, or object to both.

The petitioner pleads, " That, in the case of Brunton
" against Wilson, your Lordships did not sustain the
" verdict of an English jury as a conclusive ground of
" action in this Court ; and that, in the case of Mull-
" divan, you did not sustain the verdict of a Scotch jury
" in the Justiciary-court, as a conclusive ground of action
" in this Court."

It is answered, The reason why your Lordships laid open the verdict of the English jury was, That there was evidence before you, from whence you were enabled to form a judgment whether the verdict was just or unjust ; and, upon the consideration of it, your Lordships were of opinion that the verdict was unjust. In that case there was a special verdict, that is, the jury found such and such things, and from thence a certain conclusion was drawn. This was the same thing as if the depositions of the witnesses had been before you ; whereas neither is the case here. You have neither the depositions of the witnesses, nor a special verdict of a jury ; and therefore you have no *data*, from whence you can infer the injustice of the decree. At the same time, the decision has lost its authority, because it was reversed in the house of Lords. Nor is it any objection that it was reversed *ex parte*. It is well known that, in such cases, the House of Lords examine the decree with even more attention than if there was an appearance. With regard to the case of Mulldivan, there
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were such a number of blunders in the procedure of the jury, that it has never been looked upon as a case from which a general rule can be drawn.

It is pleaded for the petitioner, " That it is provided in his patent, that if it should be made appear to his Majesty, or any six or more of his privy council, that the grant was contrary to law, or prejudicial to the art not invented by Thomas Clark, that upon a declaration of his Majesty to that purpose, under the privy seal, the patent should cease and be void. This provision, it is said, points out the only way by which the petitioner's patent could be attacked; and that a court of law had no power to judge any question with regard to it, until the patent was recalled by the privy council."

The respondent can hardly believe Mr Clark is serious in this argument. In point of authority, the Court of King's Bench have certainly been of a different opinion from him, as they determined the cause; and the presumption certainly is, that that court judged properly with regard to its own powers. In fact, we know that questions are tried in both countries with regard to unrecalled patents; and it is certainly a very uncommon argument, that because his Majesty thinks fit to give an additional security to his subjects, against the inconveniencies that might arise from grants obtained upon mere representations, that therefore they should be deprived of the remedy competent at common law. Besides the absurdity of this proposition, the respondent would humbly apprehend, that the power of appropriating the determination of such causes to the privy council alone, is not vested, by the British constitution, in the Crown, even could it be supposed capable of such injustice. The petitioner's argument goes this length, that when the King gives a man an exclusive patent, he, and he only, can recal it. If this was true, the King might create
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ten thousand monopolies, and the subject could have no redress in courts of justice against so dangerous a prerogative. Were there any doubt with regard this argument, there is another clause in the patent by which it would be sufficiently explained. It is there said, that the patent shall not be construed "to extend to give privilege unto the said Thomas Clark, &c. to use or imitate any invention or work whatsoever, which had theretofore been found out or invented by any other of his Majesty's subjects." The Court of King's Bench were certainly judges with regard to this article; and they have found, that Mr Clark was not the inventor of the art practised by the respondent. What other conditions may be in the patent, the respondent has no opportunity to know; for the petitioner has never produced it in this Court, and what the respondent knows of it, is only from the recital of it in the decree.

It is pleaded for the petitioner, "That the English jury exceeded their powers; for that the question in issue was not the validity of the patent: The patent was unrecalled; that patent was the petitioner's title, and the jury had no right to inquire into the merit of it."

It is answered, This is just the same objection with the former, couched in different words. The petitioner's complaint was, that the respondent had infringed a patent given to him as the inventor of an art: The respondent's answer was, That he knew and had practised the art before the patent was obtained; and the petitioner confesses he brought evidence of it to a certain degree. The profession of the parties, the circumstances of the case, the proof confessed to be led, all show that this was the issue betwixt the parties. On the merits of this question a court of justice had a right to determine, otherways the Crown have prerogatives which the highest prerogative-lawyers have not hitherto thought of. It is believed the English lawyers understand the law of their own country as well as we do;
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if it had occurred to them that the jury had exceeded their powers, they would have entered an exception, and demurred to the judgment. The petitioner would never have come into this Court to save his *L.* 70 Sterling, when he could have saved it in the court where he was, and have put *L.* 500 in his pocket besides; and therefore your Lordships will presume, that the judgment given was within the powers of the court, and according to law. Nor is this presumption any great stretch, considering who presides at present in the Court of King's Bench.

The last thing pleaded for the petitioner is, That the courts of one country never inflict penalties on the sentences of another; That by act, the 23d of Henry the Eighth, if the party losing cannot pay costs of suit, he must suffer in person; and it is asked, if your Lordships would have inflicted a personal punishment upon the petitioner, supposing he had been in a state of inability to pay costs of suit?

It is answered, The petitioner cannot hope that your Lordships will confound the awarding of costs with a penal sentence, as the payment of expences is the natural and unavoidable consequence of a person's having brought a litigious and ill-grounded law-suit. If your Lordships were to find, that the petitioner was not to pay these expences, it would in reality be inflicting a penalty upon the respondent, who is in no degree to blame; and, of consequence, the petitioner's argument turns against himself.

The question in the case of Wilson *contra* Brunton, where the doctrine founded upon by the respondent was affirmed by the House of Peers, was with regard to costs; and in the case of Edwards against Prescott, the Lord Chief Justice had found Mrs. Prescott liable in *L.* 40 of costs, and *L.* 200 of damages. There it might have been pled, with some justice, that the judgment was penal; but your Lordships sustained it as the ground of action in Scotland.

III. The last ground on which the interlocutor may be defended is, that if the petitioner had injustice done him, he had relief in England. The verdict of a jury is not final in civil cases. The petitioner might have moved for a new trial, and would have got it, if injustice was done him ; or he might have preferred a bill of exceptions, and brought the case before the twelve judges of England ; and if justice was not done him upon that, he might have appealed to the House of Lords : So that his seeking redress here, when he might have got it, if he deserved it, in the country where he brought his action, is litigious and harassing to the last degree ; and could only arise from a vain hope, that this Court would do an injustice, which the English courts would not do.

In respect whereof, &c.

JOHN DALRYMPLE.

